

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

ROBERT KESSLER.

Plaintiff.

-vs-

OHK. Inc..

Defendant.

Cause No. 2:20-CV-1710-TLF

AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

COMES NOW, Plaintiff, ROBERT KESSLER (hereinafter the “Plaintiff”),
through undersigned counsel, hereby files this Complaint and sues OHK Inc., a
Washington Corporation (hereinafter, “Defendant”), for injunctive relief, attorney’s fees
and costs (including, but not limited to, court costs and expert fees), pursuant to 42
U.S.C. §12181, et. seq., commonly referred to as the “AMERICANS WITH
DISABILITIES ACT” or “ADA” and alleges:

JURISDICTION AND PARTIES

1
2 1. This is an action for declaratory and injunctive relief pursuant to Title III of
3 the Americans with Disabilities Act, 42 U.S.C. §12181, et. seq., (hereinafter referred to as
4 the “ADA”). This Court is vested with jurisdiction under 28 U.S.C. §1331 and §1343.
5

6 2. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391 in that
7 all events and procedures giving rise to this Complaint occurred in this judicial district.
8

9 3. At the time of Plaintiff’s personal visit to Defendants’ public
10 accommodation, prior to instituting he instant action, Robert Kessler (hereinafter referred
11 to as “Plaintiff”), was a resident of the State of Washington, and suffered from what
12 constitutes a “qualified disability” under the Americans with Disabilities Act of 1990, and
13 used a wheelchair for mobility due to this disability. Plaintiff has an amputated leg. He is
14 required to traverse with a wheelchair and is substantially limited to performing one or
15 more major life activities including, but not limited to walking, standing and maneuvering.
16

17 4. The Plaintiff personally visited, on or about October 26, 2020 Defendants’
18 premises open to the public, but was denied full and equal access to, and full and equal
19 enjoyment of the facilities, services, goods, privileges and accommodations offered to
20 others without disabilities; because of his disability requirements. Plaintiff lives in King
21 County, Washington and travels in the surrounding areas near Defendants’ facilities on a
22 regular basis for shopping, dining and entertainment.
23

24 5. Upon information and belief, Defendant OHK Inc., a Washington Limited
25 Liability Company or Corporation, is the lessor and/or owner operator of the real property
26
27

1 and/or premises that are the subject of this lawsuit, commonly referred to as By's Burgers,
2 located at 2901 4th Ave. South, in Seattle, Washington.

3
4 6. Upon information and belief, OHK Inc., operates the subject premises under
5 the assumed business name of By's Burgers located at 2901 4th Ave. South, in Seattle,
6 Washington and is the lessee, operator and/or tenant of the real property (the "Subject
7 Facility"). Each Defendant own, leases, leases to, or operates this property.
8
9

10 **COUNT I – VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT**

11 7. On or about July 26, 1990, Congress enacted the Americans with Disabilities
12 Act ("ADA"), 42 U.S.C. §12101, et. seq. Commercial enterprises were provided one and
13 a half years from enactment of the statute to implement all its requirements. The effective
14 date of the Title III of the ADA was January 26, 1992. 42 U.S.C. §12181; 20 C.F.R.
15 §36.508(a).
16

17 8. Pursuant to under 42 U.S.C. § 12181(7)(B) and 28 C.F.R. §36.104, the
18 Subject Facility and real property in this case is a restaurant and a place of public
19 accommodation as defined by statute.
20

21 9. Pursuant to 42 U.S.C. §12181(7) and 28 C.F.R. §36.104, the building and/or
22 premises which is the subject of this action is a public accommodation covered by the ADA
23 and which must be in full compliance therewith as of the date of the Plaintiff's visit.
24

25 10. The Plaintiff is informed and believes, and therefore alleges, that the Subject
26 Facility has begun operations and/or undergone remodeling, repairs and/or alterations since
27

1 January 26, 1990 and more specifically on or after March 15, 2012 as it pertains to 28
2 C.F.R. § 36.406 triggering the applicability of the 2010 ADAS Standards for Accessible
3 Design.
4

5 11. Defendant has discriminated under the ADA, and continue to discriminate,
6 against the Plaintiff, and others who are similarly situated, by denying full and equal access
7 to, and full and equal enjoyment of, goods, services, facilities, privileges, advantages
8 and/or accommodations at Defendants' Subject Facilities in derogation of 42 U.S.C.
9 §12101, *et. seq.*, and as prohibited by 42 U.S.C. §12182 *et. seq.*, and by failing to remove
10 architectural barriers pertaining to the Plaintiff's disability pursuant to 42 U.S.C.
11 §12182(b)(2)(a)(iv), where such removal is readily achievable.
12
13

14 12. The Plaintiff has been unable to, and continues to be unable to, enjoy full and
15 equal safe access to, and the benefits of, all accommodations and services offered at
16 Defendants' Subject Facilities. Prior to the filing of this lawsuit, the Plaintiff visited the
17 subject properties and was denied full and safe access to all the benefits, accommodations
18 and services of the Defendants. Prior to the filing of this lawsuit, Kessler, personally visited
19 By's Burgers at 2901 4th Ave. South, in Seattle, Washington, with the intention of accessing
20 Defendants' facilities, but was denied full and safe access to the facilities due to the
21 inactions of removing applicable barriers. Plaintiff intends to return to the Defendant's
22 premises and pubic accommodate upon the premises being made ADA compliant for
23 access, but is currently deterred from returning due to these barriers. As such, Plaintiff is
24 likely to be subjected to reencountering continuing discrimination at the premises unless it
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1 is made readily accessible to and usable by individuals with disabilities to the extent
 2 required under the ADA, including the removal of the architectural barrier which remain
 3 at the premises.
 4

5 13. Pursuant to the mandates of 42 U.S.C. §12134(a), on July 26, 1991, the
 6 Department of Justice, Office of the Attorney General, promulgated Federal Regulations
 7 to implement the requirements of the ADA, known as the Americans with Disabilities Act
 8 Accessibility Guidelines (hereinafter “ADAAG”), 28 C.F.R. Part 36. Defendants’ facilities
 9 do not comply with these Guidelines, nor the 2010 ADAS Standards for accessible design.
 10

11 14. The Defendant’s premises are in violation of 42 U.S.C. §12182 *et. seq.*, the
 12 ADA and 28 C.F.R. §36.302 *et. seq.*, and has and is discriminating against the Plaintiff.
 13 The Plaintiff was deterred from encountering every non-compliant barrier at the premises
 14 due to the nature of encountering some barriers that denied the Plaintiff’s full and equal
 15 enjoyment of the facility. Therefore, the Plaintiff encountered the following specific
 16 barriers to access that include but are not limited to the following, but also retains standing
 17 to allege non-compliance for any barrier not encountered by the Plaintiff at the premises
 18 related to the Plaintiff’s specific disability requirements under *Doran v. 7-Eleven, Inc.*, 524
 19 F.3d 1034, 1047 (9th Cir. 2008):
 20
 21

22 VIOLATIONS

23
 24 15(a). Failure to provide ADA compliant number of van accessible parking stalls
 25 at the subject property in violation of 2010 ADAS Section 208.2 and 208.4. and/or 1991
 26 ADA Standards for Accessible Design. The premises failed to have the proper amount of
 27

1 van accessible parking stalls to allow Plaintiff van accessible parking which Plaintiff
2 requires as Plaintiff utilizes a wheelchair due to the Plaintiff's disability and this barrier
3 removal is necessary. Said barrier is covered by the A.D.A. guidelines and is in
4 nonconformity with the requirements for such architecture.
5

6 15(b). Failure to provide ADA compliant disability accessible parking stall width
7 at the subject property in violation of 2010 ADAS Section 502.2 and/or 1991 ADA
8 Standards for Accessible Design. The premises failed to have compliant wheelchair
9 accessible parking stalls and access aisle painted line widths. Said barrier is covered by
10 the A.D.A. guidelines and is in nonconformity with the requirements for such
11 architecture.
12

13 15(c). Failure to provide ADA compliant disability accessible parking stall cross
14 slope and running slope at the subject property in violation of 2010 ADAS Section 502.4
15 and/or 1991 ADA Standards for Accessible Design. The premises failed to have
16 compliant wheelchair accessible parking stalls and access aisle cross slopes and running
17 slopes through the entire stall length and area leading to the front entrance. Said barrier
18 is covered by the A.D.A. guidelines and is in nonconformity with the requirements for
19 such architecture.
20

21 15(d). Failure to provide ADA compliant wheelchair accessible route to the
22 entrance of the building in violation of 2010 ADAS Section 403.3 and/or 1991 ADA
23 Standards for Accessible Design. The premises failed to have compliant wheelchair
24 accessible route leading to a building accessible entrance as Plaintiff utilizes a wheelchair
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1 for mobility. Said barrier is covered by the A.D.A. guidelines and is in nonconformity
2 with the requirements for such architecture.

3
4 15(e). Failure to provide ADA compliant walkway with non-compliant vertical
5 edge at the subject property in violation of 2010 ADAS Section 303.3 and 303.2 and/or
6 1991 ADA Standards for Accessible Design. The premises failed to have compliant
7 wheelchair accessible walkway as Plaintiff utilizes a wheelchair for mobility. Said
8 barrier is covered by the A.D.A. guidelines and is in nonconformity with the
9 requirements for such architecture.
10

11 15(f). Failure to provide ADA compliant accessible exterior dining tables in
12 violation of 2010 ADAS Section 226.1 and/or 1991 ADA Standards for Accessible
13 Design. The premises failed to have compliant amount of exterior dining tables as
14 Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the A.D.A.
15 guidelines and is in nonconformity with the requirements for such architecture.
16

17 15(g). Failure to provide ADA compliant counter height the subject property in
18 violation of 2010 ADAS Section 904.4.2 and 904.4.1 and/or 1991 ADA Standards for
19 Accessible Design. The premises failed to have compliant wheelchair accessible counter
20 heights as Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the
21 A.D.A. guidelines and is in nonconformity with the requirements for such architecture.
22
23

24 15(h). Failure to provide ADA compliant entrance exit identification signs at the
25 subject property in violation of 2010 ADAS Section 216.6 and/or 1991 ADA Standards
26 for Accessible Design. The premises failed to have compliant entrance/exit signage as
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1 Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the A.D.A.
2 guidelines and is in nonconformity with the requirements for such architecture.

3
4 15(i). Failure to provide ADA compliant entrance and walkway, as the entrance
5 threshold contains an abrupt vertical edge and/or variation over ¼ inch at the subject
6 property in violation of 2010 ADAS Section 216.2 and/or 1991 ADA Standards for
7 Accessible Design. The premises failed to have compliant entrance and walkway, as the
8 entrance threshold contains an abrupt vertical edge and/or variation over ¼ inch as

9
10 Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the A.D.A.
11 guidelines and is in nonconformity with the requirements for such architecture.

12
13 15(j). Failure to provide ADA compliant restroom directional and informational
14 identification signs at the subject property in violation of 2010 ADAS Section 216.3
15 and/or 1991 ADA Standards for Accessible Design. The premises failed to have
16 compliant wheelchair accessible compliant restroom directional and informational
17 identification signs as Plaintiff utilizes a wheelchair for mobility. Said barrier is covered
18 by the A.D.A. guidelines and is in nonconformity with the requirements for such
19 architecture.
20

21 15(k). Failure to provide ADA compliant restroom door hardware at the subject
22 property in violation of 2010 ADAS Section 309.4 and/or 1991 ADA Standards for
23 Accessible Design. The premises failed to have compliant wheelchair accessible
24 compliant restroom door hardware as Plaintiff utilizes a wheelchair for mobility. Said
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1 barrier is covered by the A.D.A. guidelines and is in nonconformity with the
2 requirements for such architecture.

3
4 15(l). Failure to provide ADA compliant lavatory wall-mounted objects at the
5 subject property in violation of 2010 ADAS Section 307.2 and/or 1991 ADA Standards
6 for Accessible Design. The premises failed to have compliant lavatory wall-mounted
7 objects at correct heights and protrusions as Plaintiff utilizes a wheelchair for mobility.
8 Said barrier is covered by the A.D.A. guidelines and is in nonconformity with the
9 requirements for such architecture.
10

11 15(m). Failure to provide ADA compliant lavatory clear floor space at the subject
12 property in violation of 2010 ADAS Section 604.3.2 and/or 1991 ADA Standards for
13 Accessible Design. The premises failed to have compliant wheelchair accessible
14 compliant lavatory clear floor space as Plaintiff utilizes a wheelchair for mobility. Said
15 barrier is covered by the A.D.A. guidelines and is in nonconformity with the
16 requirements for such architecture.
17
18

19 15(n). Failure to provide ADA compliant lavatory floor drain at the subject
20 property in violation of 2010 ADAS Section 604.3.2 and/or 1991 ADA Standards for
21 Accessible Design. The premises failed to have compliant wheelchair accessible
22 compliant lavatory floor drain height and slope as Plaintiff utilizes a wheelchair for
23 mobility. Said barrier is covered by the A.D.A. guidelines and is in nonconformity with
24 the requirements for such architecture.
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1 15(o). Failure to provide ADA lavatory rear grab bar height at the subject property
2 in violation of 2010 ADAS Section 609.4, and/or 1991 ADA Standards for Accessible
3 Design. The premises failed to have compliant wheelchair accessible lavatory rear grab
4 bar height as Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the
5 A.D.A. guidelines and is in nonconformity with the requirements for such architecture.
6

7 15(p). Failure to provide ADA lavatory side grab bar height at the subject property
8 in violation of 2010 ADAS Section 609.4, and/or 1991 ADA Standards for Accessible
9 Design. The premises failed to have compliant wheelchair accessible lavatory side grab
10 bar height as Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the
11 A.D.A. guidelines and is in nonconformity with the requirements for such architecture.
12
13

14 15(q). Failure to provide ADA compliant interior permanent room signage at the
15 subject property in violation of 2010 ADAS Section 216.2, and/or 1991 ADA Standards
16 for Accessible Design. The premises failed to have compliant wheelchair accessible
17 lavatory side grab bar height as Plaintiff utilizes a wheelchair for mobility. Said barrier is
18 covered by the A.D.A. guidelines and is in nonconformity with the requirements for such
19 architecture.
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21

22 16. The above-referenced barriers will likely cause a repeated real injury in fact
23 in a similar way if not remedied when the Plaintiff frequents this property again as
24 described previously. Each of these barriers interfered with the Plaintiff's full and equal
25 enjoyment of the facility and deterred Plaintiff from encountering all applicable barriers at
26
27

1 the premises by failing to allow Plaintiff the same access due to the Plaintiff's disability as
2 those enjoy without disabilities.

3
4 17. Upon information and belief, there are other current non-compliant barrier
5 access violations of the ADA at Defendants' premises, which may only be discovered and
6 properly identified once a full inspection of the premises is completed and identified due
7 to Plaintiff being deterred from discovering each and every barrier as a result of
8 encountering the above-listed violations.
9

10 18. As of the date of the filing of this suit, the readily achievable barriers and
11 other violations of the ADA still exist and have not been remedied or altered in such a way
12 as to effectuate compliance with the provisions of the ADA. The barriers to access at the
13 premises, as described above, have severely diminished Plaintiff's ability to avail Plaintiff
14 of the goods and services offered at the Subject Facilities, and compromise Plaintiff's
15 safety.
16

17 19. Pursuant to the ADA, 42 U.S.C. §12101 *et. seq.*, and 28 C.F.R. §36.304, the
18 Defendants were required to make the Subject Facility, a place of public accommodation,
19 accessible to persons with disabilities since January 28, 1992. To date, the Defendants
20 have failed to comply with this mandate.
21

22 20. The Plaintiff has been obligated to retain the undersigned counsel for the
23 filing and prosecution of this action. The Plaintiff is entitled to have his reasonable
24 attorney's fees, costs and expenses paid by the Defendants, pursuant to 42 U.S.C. §12205.
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26
27

1 21. Pursuant to 42 U.S.C. §12188, this Court is vested with the authority to grant
 2 the Plaintiff's injunctive relief; including an order to alter the subject facilities to make
 3 them readily accessible to, and useable by, individuals with disabilities to the extent
 4 required by the ADA and closing the subject facility until the requisite modifications are
 5 completed.
 6

7
 8
 9 **COUNT II: WASHINGTON LAW AGAINST DISCRIMINATION**

10 22. Plaintiff incorporates by reference all allegations in the paragraphs above.

11 23. Plaintiff is a qualified individual with a disability within the meaning of the
 12 Washington Law Against Discrimination.
 13

14 24. Section 49.60.030(1) of the Revised Code of Washington provides in
 15 pertinent part: "The right to be free from discrimination because of . . the presence of any
 16 sensory, mental, or physical disability . . is recognized as a declared to be a civil right. This
 17 right shall include, but not be limited to . . . (b) the right to the full enjoyment of any of the
 18 accommodations, advantages, facilities, or privileges of any place of public resort,
 19 accommodation, assemblage, or amusement . . ."
 20

21 25. Defendants have violated and continue to violate §§ 49.60.010 *et seq.*, of the
 22 Revised Code of Washington by violating multiple accessibility requirements under the
 23 ADA.
 24

25 26. Defendants' actions constitute discrimination against persons with
 26 disabilities and violate the Washington Law Against Discrimination, Revised Code of
 27

1 Washington §§ 49.60.010 *et seq.*, in that persons with mobility disabilities have been and
2 are denied full and equal enjoyment of the accommodations, advantages, facilities,
3 privileges, and services that Defendant provides to individuals who do not have disabilities.
4

5 27. As a direct and proximate result of Defendants' discriminatory conduct as
6 alleged in this Complaint for Declaratory and Injunctive Relief, the Plaintiff has suffered
7 and continues to suffer difficulty, hardship, isolation, and segregation and is denied the full
8 and equal enjoyment of services that the Washington Law Against Discrimination requires
9 due to Defendant's failure to remediate barriers.
10

11 28. Defendants' property does not comply with the ADA's accessibility laws and
12 regulations.
13

14 29. Because Defendants' property does not comply with the ADA's accessibility
15 laws and regulations, declaratory and injunctive relief are appropriate remedies under the
16 Washington Law Against Discrimination. *See e.g. Kucera v. Dep't of Transp.*, 140 Wash.
17 2d 200, 209 (2000).
18

19 30. Pursuant to RCW § 49.60.030(2), Plaintiff is entitled to declaratory and
20 injunctive relief and to recover from Defendants, reasonable attorneys' fees and costs
21 incurred in bringing this action.
22

23 PRAYER FOR RELIEF

24
25 WHEREFORE, the Plaintiff hereby demands judgment against the Defendants and
26 the Court declare that
27

- 1 A. The subject premises and facilities violate Title III of the Americans with
2 Disabilities Act and the Washington Law Against Discrimination;
- 3 B. The Court enter an Order requiring the Defendants to alter their facilities and
4 amenities to make them accessible to and usable by individuals with
5 disabilities to the full extent required by Title III of the ADA;
- 6 C. Any portions of the Defendant's premises identified as being non-compliant
7 under the ADA guidelines be enjoined from being open to the public until
8 such time that Defendants establish those areas are in full compliance with
9 ADA requirements.
- 10 D. The Court enter an Order directing the Defendants to evaluate and neutralize
11 their policies, practices and procedures toward persons with disabilities, for
12 such reasonable time so as to allow the Defendants to undertake and
13 complete corrective procedures to the Subject Facility;
- 14 E. The Court award reasonable attorney's fees, all costs (including, but not
15 limited to court costs and expert fees) and other expenses of suit, to the
16 Plaintiff; and
- 17 F. The Court award such other and further relief as it deems necessary, just and
18 proper.

19 DATED this 10 June 2021

20
21 Respectfully submitted,

22
23 /s/ M. William Judnich

24 M. William Judnich

25 WSBA #56087

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